

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

GENERAL MOTORS LLC,

Employer,

and

CHARLES ROBINSON,

Individual.

Cases Nos. 14-CA-197985 and 14-CA-208242

**BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS
OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE***

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a labor organization composed of 55 international unions representing over 12 million working men and women in every sector of the economy across the country. The AFL-CIO submits this brief as *amicus curiae* in response to the Notice and Invitation to File Briefs issued by the National Labor Relations Board (NLRB) at *General Motors, Inc.*, 368 NLRB No. 68 on September 5, 2019.

The AFL-CIO has a long history of working to protect the civil rights of all workers and to stamp out all kinds of discrimination, including harassment based on protected characteristics which creates a hostile work environment. The federation strongly supports diversity and inclusion in the workplace so all workers feel welcome and are able to work to support their families in a respectful and supportive workplace. The federation has a strong antidiscrimination/anti-harassment policy, as well as a code of conduct for its own employees and for attendees at AFL-CIO sponsored events. So the filing of this brief should not be construed as an attempt to undermine or undercut efforts to insure that all workers can toil in workplaces that are free of discrimination and harassment. Nor is it supportive of racially or sexually offensive comments or conduct. But in addition to supporting workers' civil rights, the AFL-CIO is dedicated to protecting the Section 7 rights of employees to engage in protected concerted activity for the

purpose of collective bargaining and other mutual aid and protection. We, therefore, strongly oppose changes in the well-settled case law which would narrow and restrict employees' rights to engage in protected concerted activity, under the guise of accommodating state and federal civil rights laws, especially because current law already provides reasonable means to harmonize the National Labor Relations Act (NLRA) requirements and an employer's obligations under Title VII and other anti-discrimination laws.

The notice and invitation suggests an intent on the part of the Board majority to reconsider three separate lines of Board case law, only one of which is placed at issue by the facts in this case. These three lines of case law apply where (1) the employee is acting as a union representative in interactions with management (generally at the employer's facility), (2) the employee is engaging in activity during the course of a strike on a picket line, and (3) the employee is posting on social media. In the notice and invitation, the majority suggests that, because in each of these three settings the expressed concern is with the use of "racially charged language" or "profane and offensive" racial or sexual language, the majority will consider picket line conduct and social media comments, matters not presented by the facts in this case because, in the majority's view, the two contexts are "not presented" only if one assumes that different standards should apply in these different contexts to ascertain whether the employee loses Section 7 protection. *General Motors, Inc.*, 368 NLRB No. 68 at sl.op, 2, fn.8. In fact, current law applies different standards in each of these settings because they are radically different and raise radically different considerations both under the NLRA and anti-discrimination laws. The Board has no basis to review the second and third category on the basis of the facts presented in this case.

The allegations in the instant case involve three instances of conduct solely within the first category, an employee acting as a union representative in meetings with members of management at the employer's facility, subject to review under the *Atlantic Steel* standard. The five questions posed by the majority in the notice and invitation to file briefs suggest reconsideration of the different standards applicable to each of the three settings (meetings at the facility, picket line misconduct and off-duty posting to social media) and imposition of a "one size fits all" solution. The majority urges merger of the

standards applicable in these completely separate and distinct settings in circumstances, based on the majority's view that all three lines of precedent concern "circumstances in which extremely profane or racially offensive language" or "sexually offensive language" is used¹. But while allegations of racially or sexually offensive language may arise in all three settings, the similarities end there. The AFL-CIO files this brief to oppose any merging of the standards applicable in these three distinct settings and to urge:

- 1) Only *Atlantic Steel* and its progeny are properly considered here, and to the extent the Board's questions posed in the invitation spill over to other areas and other cases, those issues and precedent, are not properly presented or considered.
- 2) Any standard applied to union representative meetings with management must give protected concerted activity some leeway and breathing space in view of heightened emotions and tensions that are often involved, including tolerating some inappropriate language.
- 3) The *Atlantic Steel* standard can accomplish this while respecting the employer's obligations under Title VII and other anti-discrimination statutes.

Summary of the Facts

The United Automobile, Aerospace and Agricultural Implement Workers of America, Local 31 (the Union) represents employees at General Motors' Fairfax assembly facility in Kansas City, Kansas. ALJD 1-2. Charging Party Charles Robinson, who has worked at the facility for more than 20 years, is a union committeeperson representing skilled trades employees. *Id.* at 2. As a union committeeperson, Robinson regularly meets with management to discuss issues involving the terms and conditions of employment of the bargaining unit members he represents. ALJD 2. Robinson is an African-American man. ALJD 9 & n.15.

This case involves GM's decision to discipline Robinson for his statements and actions during three labor-management meetings that occurred between April and October 2017. Robinson contends

¹ General Motors L.L.C., 368 NLRB No. 68 at sl.op. 1.

that the discipline violated Sections 8(a)(3) and 8(a)(1) of the Act because the relevant activity all occurred while he was engaged in protected activity on behalf of the Union and its members. GM contends that all of the activity was unprotected by the Act.

a. The first meeting occurred on April 11. Robinson contacted maintenance shift supervisor Nicholas Nikolaenko to address Nikolaenko's failure to abide by an agreement between the Union and GM to provide coverage for bargaining unit members when they were sent for cross-training. ALJD 3. The two men disagreed about the coverage issue and, as a result, the meeting became heated. *Id.* at 4. At that point, according to Nikolaenko, Robinson told the manager, "you can shove it up your fucking ass." *Id.* at 5.

After the meeting ended, Nikolaenko filed a complaint with GM's labor relations department about Robinson's language. ALJD 5. Robinson was subsequently issued a three-day suspension for "loud and abusive yelling" and "tak[ing] steps to coordinate resistance to for [sic] the cross-training" that GM found "violate[d] acceptable standards of conduct." *Id.* at 6 (quoting disciplinary notice).

The second meeting occurred on April 25, the date that Robinson returned to work from the above-referenced suspension. ALJD 7. On that day, Robinson attended a weekly labor-management meeting on the topic of subcontracting of work in the paint shop. *Ibid.* During the course of the meeting, Robinson asked questions about the work, hours, and shifts for bargaining unit employees and also inquired when the Union would receive documents that it had requested related to the subcontracting. *Id.* at 7-8. In response, plant manufacturing engineer Anthony Stevens and labor relations supervisor Ca-Sandra Tutt told Robinson that he was too loud and Stevens accused Robinson of intimidating him. *Id.* at 7-8. In response, Robinson sarcastically replied to Stevens, "Sir, you want me to speak like this, sir, so I don't be intimidating you, sir?" *Id.* at 8. When, later in the meeting, Stevens asked Robinson to lower his voice again, Robinson hunched over in his chair and, sarcastically using the tone of a slave, stated, "Yes, Master, sir. Is this what you look for Master, sir?" *Ibid.* Robinson also asked Stevens whether Stevens "wanted him to be a 'good Black man.'" *Id.* at 8-9.

Following the meeting, labor relations supervisor Tutt contacted Robinson and informed him that he was being put on disciplinary notice. ALJD 9. Tutt testified at the hearing that she believed that “by his comments, tone and behavior, Robinson had violated [GM]’s anti-harassment policy.” *Ibid.* At a subsequent disciplinary meeting, Robinson was issued a two-week suspension on the basis that during the labor-management meeting he “‘directed racially inappropriate comments to members of management, responding to their requests that you stop yelling by saying ‘yes master’ ‘yes master,’ and asked ‘Do you want me to speak like this?’ in a southern, country accent’” and that, by so doing, he “create[d] a hostile work environment for those in attendance.” *Id.* at 10 (quoting disciplinary notice).

The third meeting occurred on October 6. On that date, Robinson attended a weekly labor-management meeting to discuss four new electrician jobs that GM wanted to implement at the facility. ALJD 11. Robinson complained that the manpower moves at issue were “messed up” and “going to create chaos on the floor.” *Id.* at 12. At that point, Stevens said that Robinson was intimidating him again. *Ibid.* Robinson replied that, “This is the game that y’all keep playing. Every time that I get some move like y’all want to bring up that I’m threatening and intimidating you,” and referenced the ongoing NLRB proceedings in this case. *Ibid.* After some continued back-and-forth, Robinson allegedly told Stevens, “the way you’re going I’m gonna mess you up.” *Ibid.*

Later in the meeting, the alarm on Robinson’s cell phone began to play music. ALJD 12. The music continued playing for quite some time. *Id.* at 13. The management witnesses testified at the hearing that the music was “gangster rap type of music” that included “offensive lyrics and words such as the ‘N’ word, ‘F—K the police’ and other profanity.” *Ibid.* Eventually, Robinson stood up and left the meeting, saying that he was going to write up grievances and that “you can all kiss my mother fucking ass.” *Ibid.*

At a subsequent disciplinary interview, GM focused primarily on Robinson’s playing of music during the labor-management meeting and, in particular, on what songs he played and whether they used “objectionable lyrics.” ALJD 14. Robinson replied to the labor relations manager who was interviewing him, “what’s wrong with those songs? Is it because it’s Black music?” *Ibid.* Eventually, GM issued

Robinson a 30-day suspension for telling Stevens that he was “going to mess him up” and for “loudly playing music on his phone that contained objectionable language and racially charged lyrics.” *Id.* at 15 (quoting disciplinary notice).

b. The ALJ evaluated Robinson’s conduct under the familiar four-part *Atlantic Steel* test. Applying that test, the ALJ easily concluded that Robinson’s statements at the April 11 labor-management meeting were protected such that GM’s decision to discipline him violated the Act. ALJD 18-19. Citing multiple NLRB precedents holding that “employees are allowed some leeway for impulsive behavior when engaged in protected activities” because “disputes over wages, bonuses, and working conditions are among the disputes most likely to engender ill feelings and strong responses,” the ALJ concluded that Robinson’s “face-to-face use of profanity,” without any “physical or violent threat,” did not render his conduct unprotected. *Id.* at 19-20.

In contrast, the ALJ concluded that Robinson’s statements at the April 25 meeting were unprotected under *Atlantic Steel*. ALJD 22. In particular, the ALJ concluded that “Robinson’s comments arose from his personal animosity of Stevens, and unfounded belief that Stevens treated him or wanted him to submit to him like a slave,” and that Robinson “was not representing that Stevens or [GM] had engaged in unfair treatment of his constituents.” *Id.* at 23.

Finally, the ALJ concluded that GM lawfully suspended Robinson for his conduct at the October 17 labor-management meeting, again on the basis that the nature of his conduct rendered it unprotected under *Atlantic Steel*. ALJD 24. The ALJ focused primarily on the fact that “Robinson intentionally played loud music on his cell phone, with offensive lyrics, in an attempt to disrupt the meeting for the sole purpose to get Stevens to leave [the meeting].” *Id.* at 25. In sum, the ALJ concluded, “Robinson’s comment to ‘mess’ Stevens up, playing the offensive music, and using profanity on his way out of the meeting, when taken together, were sufficiently opprobrious to weigh against protection of the Act.” *Ibid.*

c. Counsel for the General Counsel excepted to the ALJ’s conclusion that Robinson’s statements at the April 25 meeting lost the protection of the Act. As the General Counsel explained, “Robinson did

not make his comments in a personal context and there is no evidence Robinson would have made the comments but for his treatment by Stevens while performing his function as a union representative.” GC Br. in Support of Exceptions 11. Rather, “Robinson used exaggerated language to prove a point about Anthony Stevens’ treatment of him during a labor-management meeting, not to create a racially hostile work environment.” *Id.* at 12. In other words, “[j]ust because Robinson used language that may have made members of management uncomfortable does not mean that it was so opprobrious as to remove his behavior from the protection of the Act.” *Ibid.*

GM excepted to the ALJ’s conclusion that Robinson’s profane statement to supervisor Nikolaenko at the April 11 meeting was protected, arguing that the ALJ misapplied *Atlantic Steel*. Resp. Br. in Support of Exceptions 5-16.

The Board then issued a Notice and Invitation to File Briefs inviting the public to address a series of five questions, four of which specifically concern “[u]nder what circumstances should . . . sexually or racially offensive speech lose the protection of the Act.” *General Motors, LLC*, 368 NLRB No. 68, slip op. 2 (2019). As noted above, the only exception that bears on this question is the General Counsel’s exception to the ALJ’s conclusion that Robinson’s use of a sarcastic “slave voice” was unprotected and, specifically, the General Counsel’s argument that “Robinson used exaggerated language to prove a point about Anthony Stevens’ treatment of him during a labor-management meeting, *not* to create a racially hostile work environment.” *Id.* at 12 (emphasis added).

Argument

1. Only Atlantic Steel May Be Considered Here

We start with strong objections to the Board’s plan to address three entirely, separate circumstances, only one of which relates at all to the facts in the case before it. The announced intention to re-consider the holdings in three cases, *Cooper Tire & Rubber Co.*², *Plaza Auto Center, Inc.*³ and *Pier*

² 363 NLRB No. 194 (2016), *enfd.* 866 F.3d 885 (8th Cir. 2017).

³ 360 NLRB 972 (2014).

*Sixty, LLC*⁴, when only facts implicating the decision in *Plaza Auto* are before the Board, is inappropriate. When adjudicating cases, the Board may address only matters actually presented in the case before it and may not render advisory opinions on other matters.⁵ As Member McFerran noted in her dissent, full scale reconsideration of Board precedent in these multiple areas, outside of a case in which the precedents were or might have been applied, would be done more appropriately through rulemaking.⁶ Cf. *Wyman-Gordon Co.*, 394 U.S. 759 (1969) (finding the Board does not have discretion to make rules in an adjudicatory proceeding and thereby avoid the requirements of the Administrative Procedures Act).

Under current Board law, the facts presented in the instant case are appropriately subject to the *Atlantic Steel* standard and therefore the only case arguably appropriate for reconsideration, of those mentioned in the invitation, is *Plaza Auto Center, Inc.* The only issue presented to the Board is whether the charging party, acting in his capacity as union committeeman, in the course of his meetings with supervisors and management representatives relating to working conditions (clearly protected concerted activity as the meetings addressed cross-training, subcontracting and reassignments) used language or acted in a way which caused him to lose Section 7 protection. To go beyond that issue and address picket line misconduct or off-duty postings to social media will result in improper rulemaking or mere *dicta*. Accordingly, we address only the *Atlantic Steel* standard which is the appropriate standard for evaluating the particular kind of protected concerted activity at issue here. In labor-management meetings, typically, as here, bargaining unit employees who are not acting as representatives are not present (i.e., other than perhaps fellow stewards or committeemen) and, as here, the conduct or speech of the employee is directed to a superior, not a co-worker.

2. The Board Must Allow Breathing Space Around Protected, Concerted Activity

⁴ 362 NLRB 505 (2015), *enfd.* 855 F.3d 115 (2nd Cir. 2017).

⁵ Compare *Snohomish Cty. Headstart*, 254 NLRB 1372 (1981) (generally, the Board does not issue advisory opinion, with one exception found in Section 102.98 of the Board's Rules and Regulations: it will render advisory opinion when a party doubts whether the Board will assert jurisdiction), with *Albert Einstein Coll. of Med.*, 226 NLRB 1141, 1142 (1976) (dissenting opinion) (the Board dismisses petitions for advisory opinion when there was no jurisdiction issue)

⁶ *General Motors LLC*, 368 NLRB No. 68 at sl.op. 4.

With this unique setting in mind, we turn to the special characteristics of this kind of protected concerted activity. It is well-established that in the course of engaging in protected concerted activity, tempers may flare and the courts have recognized the need for flexibility and breathing room for employees engaged in protected concerted activity. The Board recently described the test for examining speech in the context of protected activity as recognizing “that tempers may run high in this emotional field, that the language of the shop is not the language of ‘polite society’ and that tolerance of some deviation from that which might be the most desirable behavior is required....and offensive, vulgar, defamatory or opprobrious remarks uttered during the course of protected activities will not remove activities from the Act’s protection unless they are so flagrant, violent, or extreme as to render the individual unfit for further service.” *Constellium Rolled Products Ravenswood, LLC*, 366 NLRB No. 131 (2018) sl.op. 3 at fn 12 (internal citations omitted). Labor disputes are heated affairs; and often involve intemperate language.⁷ As the Supreme Court noted when considering the interplay between state defamation law and Section 7 activity in *Linn v. United Plan Guard Workers of America, Local 114*, 383 U.S. 53, 58 (1966): “Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable *per se* in some state jurisdictions. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language.” In *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 283 (1974), the Court elaborated: “*Linn* recognized that federal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point.” (This case involved publication of union newsletter where particular employees were listed as “scabs” and the Jack London definition of scab was set out). No court has questioned this basic principle. Profanity is a common means of expressing strong feelings

⁷ *Linn v. United Plan Guard Workers of America, Local 114*, 383 U.S. 53, 58 (1966).

throughout our culture. Unfortunately, this sometimes includes use of racially and sexually derogatory and charged language. Thus, the Board would impair Section 7 rights if it were to carve out a special category for either of those types of speech as recognized by *Linn*. It is more appropriate to evaluate particular speech, not based by a fixed category (racially or sexually offensive speech) but by examining the words used, the context, the manner in which the words were used, and the impact on others.

The basic *Atlantic Steel* approach, which recognizes that some allowance must be made for strong and even inappropriate language in the exercise of protected concerted activity, is sound. Many cases will not raise federal antidiscrimination concerns at all because the speech at issue, while profane or obnoxious, does not concern any protected characteristic. In fact, this arguably is true of the speech and conduct in the three meetings at issue in this case. In the first meeting, some of the speech was profane or obnoxious (“you can shove it up your f---king ass”) but didn’t address a protected characteristic. The second meeting is asserted in the disciplinary notice to have involved racially offensive language but in fact, Robinson’s language more appropriately should be viewed as being a sarcastic response raising his objection to discriminatory put-downs by a supervisor. The charging party viewed the repeated objections from Stevens and Tutt to lower his voice and stop “intimidating” them as repeated and racist dismissals of the points Robinson was trying to make as a committeeman in several meetings by the supervisors. His mocking lowering of his voice and projecting a subservient position was not to create a hostile work environment but, through sarcasm, to raise an objection to racist treatment directed towards him by supervision, denigrating him as he tried to fulfill his role as union representative. In the final meeting (not the subject of exceptions by either party) the only racially charged language was in recorded lyrics of the rap songs playing on the charging party’s cell phone which were not directed at a particular person’s protected characteristics. The statement “you can all kiss my motherf---king ass” as he walked out the door, again while offensive language, was not directed at any protected characteristic.

In the instant case, the ALJ examined these three separate, onsite meetings between the charging party and management representatives⁸ and after properly, and carefully applying the *Atlantic Steel*⁹ criteria to each instance, concluded that in the first meeting the charging party's conduct was not sufficiently egregious to cause him to lose Section 7 protection. In contrast, the ALJ concluded, after applying the same *Atlantic Steel* criteria, that the second and third instances were not protected. In *Atlantic Steel* the Board set forth 4 factors to consider to determine whether an employee engaged in concerted protected activity at the workplace, by opprobrious conduct, has lost the protection of the Act. These are (1) the place of the discussion, (2) the subject matter of the discussion, (3) the nature of the employee's outburst, and (4) whether the outburst was in any way provoked by an employer's unfair labor practices.¹⁰ The NLRB has repeatedly applied the *Atlantic Steel* test to cases where the protected activity occurred at the employer's facility on the plant floor, in a supervisor's office, or in grievance meetings, over the last 40 years with a range of results, depending on the particular facts and circumstances. Courts have sometimes disagreed with the results of the Board's application of the test to a particular set of facts, but no court has rejected the Board's legal test, as noted by Member McFerran in her dissent.¹¹

The only modification we would suggest to the *Atlantic Steel* approach is that the Board should make clear that when the context of the alleged misconduct is a labor-management conference, as here, and only management agents are parties to the communications, those factors weigh very heavily in favor of continued protection. There should be no automatic differentiation or special rule for profanity or language that is offensive to others on the basis of race or sex. The *Atlantic Steel* standard already provides a means for considering the impact and effect of profane or offensive language in the particular circumstances of any given case. There is no reasonable basis for singling out profane or racially or

⁸ In the first meeting only the charging party was present with a single member of management, with other managers in the vicinity. In the two subsequent meetings, the charging party and several other union representatives were present at meetings with multiple members of management. ALJD at 4,7, and 11.

⁹ *Atlantic Steel Co.*, 245 NLRB 814 (1979).

¹⁰ 245 NLRB at 816.

¹¹ GM LLC, 368 NLRB at sl.op.4.

sexually offensive language as compared to other inappropriate language or conduct and applying special rules to the former. The *Atlantic Steel* factors provide a means of considering and balancing the employer's interest in maintaining order at its facility and the employee's interest in exercising Section 7 rights.

Whether in a given setting the employee's conduct or speech is so egregious or opprobrious as to lose protection depends not only what is said (and even more specifically the words used), but also the circumstances in which it is being said---which is exactly what the Board and courts have considered when applying *Atlantic Steel*. The four criteria reviewed under *Atlantic Steel* provide a means for considering the impact and effect of profane or offensive language (or any other language or act) in the particular circumstances of any given case. In particular, the third criteria, "nature of the employee's outburst" provides a place to consider not just the words uttered, but the circumstances in which they were uttered and their impact and effect in that setting. What a word means and how it impacts the person on the receiving end cannot be viewed in a vacuum and must be examined in context. This point was effectively made by the Supreme Court in the context of employment law in a case with a tortured history both before and after the Supreme Court issued its per curiam opinion.¹² In *Ash v. Tyson Foods*, the Supreme Court reversed the 11th Circuit decision (remanding for further consideration) because the 11th Circuit had determined that evidence that a supervisor referred to an African American man as "boy" without any modifier could not be viewed as evidence of racial animus to support the plaintiff's claim of race discrimination. The Court disagreed, stating, "Although it is true the disputed word [boy] will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court's decision is erroneous."¹³

¹² *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006).

¹³ *Id.* at 456.

While ordinarily the totality of the circumstances must be considered under *Atlantic Steel*, in the rare instance where an outburst is of a nature that it would obviously be considered so severe as to constitute harassment *per se* under governing federal antidiscrimination law, the Board could find the speech unprotected under *Atlantic Steel* factor three without regard to the other factors. But none of the speech at issue in this case even approaches that threshold and thus the Board should not speculate about cases not before it in deciding this case.

In applying the *Atlantic Steel* test, the norms of the workplace are obviously relevant. They suggest what the employer has tolerated in the past and also what impact such language or action is likely to have on other employees. The Board should thus consider those norms in applying factor three under *Atlantic Steel*.

3. *Atlantic Steel* is Consistent with Antidiscrimination Law

Federal antidiscrimination law is not grounds for altering the *Atlantic Steel* standard. Antidiscrimination law renders unlawful severe or pervasive harassment based on a protected characteristic. Antidiscrimination law is primarily concerned with discrimination and harassment effected by those who have the authority of the employer. As the EEOC's amicus brief in this case states:

Harassment perpetrated by a supervisor is inherently more severe than that of a coworker because of the supervisor's authority over the employee. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 763 (1998) (“[A] supervisor's power and authority invests his or her harassing conduct with a particular threatening character[.]”); *Boyer-Liberto v. Fountainebleau Corp.*, 786 F.3d 264, 278 (4th Cir. 2015) (en banc) (“In measuring the severity of harassing conduct, the status of the harasser may be a significant factor—e.g., a supervisor's use of [a racial epithet] impacts the work environment far more severely than use by co-equals.”) (internal quotation marks and citation omitted).
[EEOC Brief at p.10]

In most cases where a protected characteristic is referenced in speech not by a speaker who wields the power of the employer, the speech would only be considered unlawful under federal antidiscrimination law if the speech is generally pervasive in the workplace, *i.e.*, federal law makes clear that sporadic discriminatory statements by coworker, as in this case, do not provide a cause of action against the employer for harassment. This is particularly true when the statements are by a subordinate

and directed against a superior. In fact, the EEOC cited only one case where it asserted such conduct was held to violate Title VII. And in that case, *Franchina v. City of Providence*, 881 F.3d 32, 55 (1st Cir. 2018), a full review of the facts set forth in great detail in the court’s decision discloses that the plaintiff was subjected to a pattern of pervasive and severe harassment that spanned a multi-year period and involved harassment by subordinates, coworkers on an equal level and her superiors. In a number of instances when she was subjected to harassment by subordinates, supervisors were also present and either participated or did nothing to address the harassment. The 1st Circuit upheld the jury’s finding that the plaintiff was subjected to a hostile work environment but it is misleading to suggest this finding was based upon harassment by her subordinates.

In addition, just as the *Atlantic Steel* standard takes into account the circumstances of the speech or conduct, so too Title VII requires review of the circumstances in which the harassment occurred in order to determine whether it rises to the level of harassment which creates a hostile work environment for the victim. According to the Supreme Court in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), all the circumstances may include “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance”. *Id.* at 23. In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), Judge Scalia, writing for the majority noted:

We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering “all the circumstances”. [*Harris* citation omitted] In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player’s working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach’s secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.¹⁴

¹⁴ 523 U.S. at 81-82

The Supreme Court first established the contours of sexual harassment (based on circuit court cases addressing harassment based on race or national origin) as a type of unlawful discrimination where an employer could be liable for a hostile or abusive work environment in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). To be actionable, the harassment has to be “sufficiently severe or pervasive to alter the conditions of [the victim’s] employment and create an abusive working environment.” *Id.* at 67. This means that there are numerous cases where offensive comments of a sexual or racial nature are not actionable because they are isolated, so not pervasive and not severe.¹⁵ Even where the comments or actions are severe or pervasive, they may not result in liability on the part of the employer because they may not alter the conditions of the victim’s employment. In addition, in terms of standards for finding an employer liable, the Court has delineated significant distinctions between behavior by supervisors¹⁶ and behavior by co-workers. See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). and *Burlington Industries, Inc.* 524 U.S. 742 (1998). In cases of co-worker harassment, the standard for employer liability is a negligence standard.¹⁷ Under this standard, an employer is liable for severe or pervasive harassment based upon a protected characteristic where the employer knew or should have known that harassment occurred and where the employer failed to take prompt and appropriate corrective action. In contrast, an employer will be vicariously liable for acts of severe or pervasive harassment based upon a protected characteristic by a supervisor or other agent with authority over an employee but the employer can assert an affirmative defense to avoid liability in those cases in which the employee subjected to the harassment has suffered no tangible job consequences as result of supervisor's actions. The affirmative defense requires the employer to show that it exercised reasonable care to prevent and correct promptly any

¹⁵ “Title VII does not prohibit all verbal or physical harassment and [it] is not a general civility code for the American workplace.” *Nitsche v. CEO of Osage Valley Elec. Coop.*, 446 F3d 841,846 (8th Cir. 2006) (internal quotations omitted).

¹⁶ And the Supreme Court has applied a more stringent standard for determining a person to be a supervisor for the purposes of Title VII liability than under other statutes such as the NLRA. In *Vance v. Ball State University*, 570 U.S. 421 (2013), the Court held that for the purposes of vicarious liability under Title VII, the person must be empowered by the employer to take tangible employment actions (hiring, firing, failing to promote, reassignment with significant changes or significant changes in benefits) against the victim.

¹⁷ *Id.* at 424.

sexually harassing behavior **and** that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided or to avoid harm otherwise. The affirmative defense is not available where the supervisor's actions have resulted in a tangible job consequence. *Faragher* at 799-800.

Almost all the cases cited by the EEOC in its brief in this case involve harassment by supervisors. As noted above, the *Franchina* case, cited by the EEOC as a case involving harassment by a subordinate, actually involves harassment by superiors too. This is important because all *Atlantic Steel* type cases that have or will come before the Board, requiring consideration of speech or conduct in labor-management meetings, will only involve the speech or actions of an employee who is a subordinate, with no supervisory authority. Because supervisors do not enjoy the protection of Section 7, in every instance where the Board might be called upon to evaluate hostile work environment claims based on harassment, the conduct or speech in question will be that of a co-worker or a subordinate. Here, for instance, Robinson was subordinate to the supervisors to whom he allegedly directed his comments and actions. Thus, in every instance in this context, the potential for employer liability under anti-discrimination law will be based solely upon a negligence standard, and such liability can be avoided so long as the employer takes immediate and appropriate action. While employers may well want to address behavior that has not yet risen to the level of pervasive harassment, as suggested by the EEOC in their brief in this case (EEOC Brief at pp. 21-23), in most cases, appropriate corrective action at that stage will not be termination or even formal discipline. Thus, the action that may be required of the employer under Title VII is not necessarily discipline that would violate the NLRA. Rather, the employer may satisfy its obligation via "strong disapproval" of the potentially harassing conduct. 29 C.F.R. section 1604.11(f). Appropriate corrective action does not necessarily require that the employee be discharged or disciplined but could be as simple as affirming to employees the employer's condemnation of such conduct or speech. Depending on the circumstances, the appropriate corrective action for addressing an offensive comment need not interfere at all with the employee's Section 7 rights.

Conclusion

The Board should refrain from addressing any precedent not implicated by the facts before it in this case. This case involves only the application of *Atlantic Steel* to labor-management meetings between union representatives and members of management. The Board should continue to apply this standard to review speech and conduct at labor-management meetings because it provides a workable means of harmonizing the employer's obligations under antidiscrimination laws and Section 7 of the NLRA.

Respectfully submitted,

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Certificate of Service

I hereby certify that I electronically filed the forgoing brief with the NLRB via the E-file system on November 12, 2019, and also served the foregoing brief via email on the parties listed below:

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